

**STATEMENT OF
MICHAEL H. SHAPIRO
OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON FINANCE AND HAZARDOUS MATERIALS
OF THE
COMMERCE COMMITTEE
U.S. HOUSE OF REPRESENTATIVES**

MARCH 20, 1997

Good morning, Mr. Chairman and members of the Subcommittee.

I am Michael H. Shapiro, Acting Deputy Assistant Administrator of the Office of Solid Waste and Emergency Response of the U.S. Environmental Protection Agency (EPA). I appreciate the opportunity to testify on H.R. 688 which would amend the Resource Conservation and Recovery Act's Subtitle I provisions for the Leaking Underground Storage Tank (LUST) Trust Fund. I also would like to thank you for your willingness to listen to our concerns and consider changes. During the 104th Congress, we worked closely with members of the Subcommittee and their staffs on H.R. 3391, which has been reintroduced in its amended form and is the subject of today's hearing. We greatly appreciate the productive relationship we had with the Subcommittee and staff last year and look forward to continuing to work with you in the future.

Despite the productive dialogue which occurred between the Agency and your Subcommittee last year, the Administration was not able to support the version of H.R. 3391 which passed the House. As I will explain in my testimony, the Administration's

thinking on the use of LUST Trust Funds has evolved since that time. However, we continue to believe: (1) that any contemplated use of Trust Funds assures that the funding appropriations necessary to oversee the large number of responsible party cleanups and to support cleanup of abandoned sites are provided for; (2) that funds be used to protect the nation's groundwater; and (3) that EPA has the flexibility to manage the Trust Funds to achieve the maximum protection for human health and the environment. As a result, we continue to be concerned over aspects of the proposed legislation. Before discussing our concerns, however, I would like to provide some background information on the federal LUST Trust Fund and on the funds that states have established to help pay for leaking underground storage tank cleanups.

Since its inception in the mid-1980s, EPA's Underground Storage Tank Program has developed an effective partnership with states to implement the program. The states and EPA together have accomplished a great deal: 317,000 releases have been identified; 252,000 cleanups have been initiated; and 153,000 cleanups have been completed. From the outset, this program was designed to be implemented primarily by the states. In general, all states implement the underground storage tank program under grants and cooperative agreements with EPA, although EPA retains responsibility for implementing the program in Indian Country.

We believe that this effective partnership serves in many ways as a model for other programs.

States use LUST Trust Funds to oversee cleanups, perform state-lead cleanups when a responsible party cannot be found or is unable or unwilling to remediate a site which presents an imminent threat to public health or the environment, and take enforcement actions at leaking tank sites. In the past few years, appropriations for the Trust Fund have generally been below the Administration's request. For Fiscal Year 1998 the Administration is proposing \$71.2 million, an increase of \$11.2 million, for currently allowed uses of the LUST Trust Fund, which would return the appropriations to Fiscal Year 1995 levels.

LEAKING UNDERGROUND STORAGE TANK TRUST FUND

Background

Congress created the Leaking Underground Storage Tank (LUST) Trust Fund in 1986 to provide a stronger funding base for the cleanup portion of the underground storage tank program. The LUST Trust Fund provides money for EPA to help administer the program. More importantly, the Trust Fund provides funds for states to oversee cleanups, take enforcement actions at leaking tank sites, and undertake state-lead cleanups when a responsible party cannot be found or is unable or unwilling to remediate a

site which presents an imminent threat to public health or the environment.

The preponderance--an approximate average of 85 percent--of the LUST funds Congress has appropriated to EPA since 1986 has been awarded to the states under formal cooperative agreements. As I mentioned before, we believe that the states and EPA have forged an effective partnership that, in many ways, can serve as a model for other programs. While a great deal of work remains to be done, the states supported by EPA, have been able to oversee completion of more than 150,000 cleanups.

In the LUST Trust Fund authorizing legislation, Congress established that responsibility for cleaning up a site rests with the owner or operator of the UST. The Trust Fund is intended to be a fund of last resort. Thus, parties responsible for leaks are not eligible to receive LUST Trust Fund money. Further, in the limited number of instances when the Trust Fund is used for cleanup, the tank owner or operator is liable to EPA or the state for its incurred cost of cleanup.

Appropriations History

To date, the highest appropriation to EPA from the LUST Trust Fund was \$83 million in Fiscal Year 1993. In Fiscal Year

1996, the Administration requested \$77.3 million and received \$45.8 million. In Fiscal Year 1997, EPA received \$60 million, and the Administration has requested \$71.2 million in its Fiscal Year 1998 budget proposal. Workload is at an all-time high in the LUST program as the number of confirmed releases now exceeds 315,000, and states are currently overseeing more than 160,000 active cleanups. Furthermore, we expect that states may identify as many as 100,000 additional releases as owners and operators comply with requirements to upgrade, replace, or close their tanks by December 1998. EPA has no intention of extending the deadline and states have no authority to do so. Thus, the states face a formidable and increasing workload.

I would like to note another aspect of the Administration's budget proposal. As part of the Fiscal Year 1998 budget submission, the Administration has proposed to transfer \$53 million from the LUST Trust Fund to reimburse the General Fund for three EPA programs: the Underground Storage Tank Program (\$17.2 million), Underground Injection Control Program (\$22.6 million), and the Groundwater Protection Program (\$13.5 million).

The Administration believes these existing programs should be funded from the LUST Trust Fund because they all address protection of groundwater from underground sources of contamination. States have reported that leaking underground storage tanks are the leading source of groundwater pollution,

and petroleum is the most prevalent contaminant (National Water Quality Inventory, Report to Congress, December 1995). The \$53 million needed to implement these programs in 1998 would continue to be requested through their traditional appropriations accounts and paid out of the General Fund. However, EPA's General Fund would be reimbursed for the cost of these programs through a \$53 million transfer payment from the LUST Trust Fund to the General Fund. This transaction would not affect the appropriation level for the LUST Trust Fund corrective action program.

The Administration also is proposing to reinstate the LUST tax of 0.1 (one-tenth) cent on each gallon of motor fuel sold in the country to fund the LUST Trust Fund through 2007. The LUST tax expired December 31, 1995.

STATE ASSURANCE FUNDS

States originally developed assurance funds to help pay for cleanup of sites with pre-existing contamination and to enable tank owners to comply with federal financial responsibility requirements for USTs. The use of state assurance funds as a compliance mechanism is allowed in the federal statute enacted in 1986 and in EPA's financial responsibility regulations. States voluntarily choose to submit their funds to EPA so that EPA can determine that funds are "equivalent" to other mechanisms

allowed by the regulation such as insurance, letters of credit, surety bonds, and corporate guarantees. Currently, 42 states have submitted their funds to EPA for approval, and 34 funds have been approved. Pending the EPA Regional Administrator's determination that a fund is an acceptable compliance mechanism, the owners of USTs in that state will be considered to be in compliance with the financial responsibility requirements for the amounts and types of costs covered by the state assurance fund.

In general, the state assurance funds act as a reimbursement mechanism, paying owners and operators for costs incurred in remediating releases. These owners and operators are usually known, willing to perform cleanups, and solvent. In contrast, when federal LUST funds are used for a cleanup, it is likely that the owner or operator is unknown, unwilling, or unable to pay for the remediation.

Aside from serving as the primary mechanism for financial responsibility compliance for many businesses (especially small businesses), state funds are playing a major role in state cleanup programs, and that role continues to grow in importance.

Collectively, the existing state assurance funds raise almost \$1.2 billion annually to help pay for cleanups. Had state assurance funds not existed, many cleanups, especially cleanups of historical releases, would not have occurred. Compared to the

most recent LUST Trust Fund appropriation, the states are raising approximately 20 times more than the current annual appropriation. Perhaps more significantly, at a time when LUST Trust Fund appropriations have declined, state assurance fund revenues are increasing. In the last four years, state funds have increased revenues by 30%. However, claims against the funds also are growing. The most recent data collected by the states show outstanding claims at \$2.8 billion, with the current balance in the funds amounting to \$1.3 billion and current income at \$1.2 billion per year.

In the sections which follow, I plan to discuss EPA's three specific concerns with the proposed legislation.

EPA'S CONCERNS WITH H.R. 688

1. Expanding Uses of the LUST Trust Fund Could Reduce Protection of Public Health and the Environment

Currently, the LUST Trust Fund provisions of RCRA Subtitle I allow for expenditure of Trust Fund monies for several purposes, including direct cleanup of leaking USTs, enforcement and issuance of corrective action orders to responsible tank owners and operators to compel them to clean up, and cost recovery of Trust Fund monies. Through negotiated cooperative agreements, EPA and states together determine how best to balance Trust Fund

monies among these eligible activities to maximize protection of public health and the environment.

EPA is concerned that supplementing state financial assurance funds with the LUST Trust Fund as proposed under H.R. 688 could come at the expense of the existing LUST Trust Fund corrective action programs within the states and could significantly reduce the number of UST cleanups undertaken and completed. For Fiscal Year 1998, the Administration's budget request for the LUST Trust Fund is \$71.2 million. This level would not provide adequate funding to support such new uses of the Fund to the extent that the new uses significantly divert money from the current corrective action program.

For the vast majority of leaking UST sites, EPA and the states that implement the LUST Trust Fund program have been able to identify a responsible party (RP) and, in 95% of the cases, compel the RP to perform the cleanup. Typically, the RP, a state cleanup fund, and/or private insurance bear the costs of the cleanup. In these cases, the LUST Trust Fund is used to fund state staff to enforce and oversee the cleanups performed by RPs. With a few thousand dollars of LUST Trust Fund money, a state staff person can oversee a RP-lead cleanup from initiation to completion.

During the past eight years, more than 250,000 UST cleanups have been initiated or completed by RPs under the oversight of state staff. It is clear that federal funding of state staff for oversight of these RP-lead cleanups is a key factor in the overall success of the LUST Trust Fund program. To the extent that Trust Fund monies are redirected to pay for state assurance fund cleanups as called for in H.R. 688, this could result in reduced funding for existing activities and reduced protection of human health and the environment.

EPA believes that the states' current approach to spending Trust Fund monies is an efficient and effective way of leveraging taxpayer dollars. Spending a relatively small amount of federal money per site for oversight, rather than states using federal money to conduct or reimburse cleanups, has four primary benefits: (1) extending Trust Fund monies by reducing the number of federally-funded cleanups; (2) ensuring that more responsible parties clean up their own sites; (3) improving the quality and timeliness of responsible party cleanups; and (4) preserving Trust Fund monies to pay for cleanup of orphan or abandoned sites, where responsible parties cannot be identified.

H.R. 688 also provides for a second new use of LUST Trust Fund monies, the use by states for enforcement of the UST

technical standards and the 1998 tank upgrading requirements. The amount of LUST Trust Funds needed for this purpose would be relatively small and could be used very effectively by the states. We do not believe that use of LUST Trust Fund monies for enforcement purposes would drain substantial funds from state LUST technical programs and in the long term helps these programs by reducing the number of future leaks. Since this relatively small investment could have substantial benefits, we support use of LUST Trust Fund monies for enforcement purposes as called for in H.R. 688.

2. Federal Funds Could Be Used to Reimburse Tank Owners and Operators Where Other Resources Are Available

The LUST Trust Fund program as enacted by Congress in 1986 was designed to hold tank owners responsible for cleaning up and paying for releases from their USTs. The statute provides for the use of Trust Fund money for direct site cleanup where a tank owner is unknown, unable to perform the cleanup, or refuses to perform the cleanup. Where Trust Fund monies are used directly for cleanup, Congress requires that responsible tank owners and operators be held liable in cost recovery actions for such expenditures. EPA remains committed to the principle that financially viable responsible parties pay for the cost of remediating contamination.

When H.R. 3391 was considered during Subcommittee and Committee action last year, it was amended so that responsible parties would only be reimbursed when "the financial resources of an owner or operator, excluding resources provided by programs under section 9004(c)(1), are not adequate to pay for the cost of a corrective action without significantly impairing the ability of the owner or operator to continue in business." This language has been retained in H.R. 688. It is our understanding that this language is intended to address the legitimate concerns of small businesses that may not be able to afford the cost of corrective action. We believe, however, that the language does not fully meet this intent and is unnecessarily broad. The language would be improved, for example, by including coverage provided by a state fund in the determination of financial hardship, in order to ensure that only those parties that truly have no other financial resources benefit from federal funding. We would be happy to work with the Subcommittee to revise the language to accomplish our understanding of its intent at a lower cost.

It also should be noted that state funds do pay for responsible parties' costs to remediate a site. This is a complex decision that the states have made based on criteria such as the make-up of their regulated communities, the availability of insurance in their states and the vulnerability of their groundwater and drinking water supplies. EPA has supported the

states in establishing assurance funds, believing that states should have the flexibility to design their own programs to best deal with their problems. However, EPA believes that supporting state-based decisions is very different from establishing federal level policy to pay for responsible party cleanups. EPA believes that Congress correctly defined the federal role with respect to paying for cleanups when it established the LUST Trust Fund in 1986.

3. Codifying EPA's Grant Award Patterns is Unnecessary and Reduces Flexibility

H.R. 688 would specify in statute the relative funding levels for distributing Trust Fund money to the states. The 85% annual state funding level mandated in H.R. 688 reflects EPA's historical performance in awarding Trust Fund money to states, i.e., on average, EPA has awarded approximately 85% of appropriated LUST Trust Fund monies to the states each year. The annual award of Trust Fund monies to states varies, however, and has ranged from 81% to 89% since 1989. In years of reduced appropriations, such as Fiscal Year 1996, it would be impossible for EPA to comply with the 85% mandate, without sustaining severe internal cuts in the Agency's Trust Fund program. In Fiscal Year 1996 when the appropriation dropped to \$45.8 million, EPA shared in the budget cuts but retained 19% of the appropriated funds and

awarded 81% to the states. This enabled us to retain experienced and talented staff in the program. This proved to be very important especially since the appropriations increased in Fiscal Year 1997 and we were able to continue progress on our major initiatives.

In the future, the Agency needs to maintain the flexibility to revise the percentage distribution, as environmental risks and resource levels change. This is especially important as EPA moves forward with implementing the LUST program in Indian Country because additional resources are needed to conduct federal lead emergency responses and corrective action activities. Thus, we believe that determining the percentage of LUST Trust Fund monies to be awarded should remain within EPA's discretion, and percentages should not be set by statutory language.

Mr. Chairman, this concludes my testimony. I will be happy to answer any questions you or other members of the Subcommittee may have.